CHAN LYE HUAT

v.

TAN ONG KONG

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL SUIT NO. 230/80]
24 NOVEMBER 1983

TORT: *Negligence - Motor accident - Whether appellant liable - Contributory negligence.*

DAMAGES: *Special damages - Partly awarded - No proof of loss of items - No receipts - No award - General damages - Appellant has own business - Whether loss of future earnings calculated on sum paid to an assistant to run business - Permanent disability of forearm.*

The appellant is appealing from a decision of the Magistrate in respect of damages for personal injuries and other losses suffered by him as a result of an accident on 19 October 1979. The appellant was riding a motor cycle when he was involved in an accident with a motor car travelling in the opposite direction.

Held:

[1] From the facts of the case and on a balance of probabilities the accident occurred when the respondent was partly on the wrong side of the road but was cutting back to his correct side and whilst the appellant was driving about 3 feet or nearer to the centre white line on the road. In these circumstances the liability was apportioned as one-third on the part of the appellant and two-thirds on the part of the respondent.

[2] Special Damages awarded as follows:

(a) As agreed by both Counsel - RM400 for transport and food for the appellant's family to visit him in the General Hospital, Penang. RM180 for taxi fares from Butterworth to General Hospital, Penang for review at RM30 per round trip for six times.

(b) The appellant's claim for RM905 for loss of watch, RM20 for loss of crash helmet and RM40 for damage to his clothes and RM222.50 for repairs to his motor cycle disallowed because appellant could not prove the loss of those items specifically by producing receipts which could be admitted as evidence.

(c) The appellant could not prove specifically what his actual loss of income for the period 20 October 1979 to 31 December 1980 was and it was suggested that he be compensated for half the loss of income claimed during that period. Therefore a sum equivalent to half of RM11,493 was allowed.

(d) RM270 per month from 1 January 1981 to 24 November 1983 as amount paid to the appellant's assistant for helping him to run the business.

[3] General Damages awarded as follows:

(a) Loss of future earnings - appellant was 40 years old at date of trial and should have another 15 years' working life. Five years were deducted for contingencies and counsel for appellant agreed on a multiplier of ten years.

General damages were awarded for loss of future earnings based on ten years' purchase at the rate of RM270 per month being the sum appellant paid to the assistant to help run his business.

(b) Pain and suffering - the doctor stated that there may be permanent disability due to serious deformed right forearm resulting in stiff and weak right hand with loss of manual dexterity and ability to twist the forearm. Therefore a sum of RM20,000 was awarded for pain and suffering.

[4] Interest at the rate of 3% p.a. on special damages from date of accident to date of trial and 6% on RM20,000 from service of writ to date of trial together with taxed costs.

[Appellant entitled to two-thirds of various amounts assessed as he was found to be one-third liable for contributory negligence.]

Cases referred to:
Nance v. British Columbia Electric Ry [1951] AC 601
Besetti Appalanaidu v. State of Johore & Ors. [1965] 2 MLJ viii
Goh Beng Seng v. Dol bin Delah [1970] 2 MLJ 95

For the plaintiff/appellant - Triptipal Singh Bhar; M/s. Triptipal Singh & Co.
For the defendant/respondent - P.R. Manecksha; M/s. V.P. Nathan & Partners

JUDGMENT

Gunn Chit Tuan J:

Chan Lye Huat (the appellant) claimed damages for personal injuries and other losses suffered by him as a result of an accident at about 11 a.m. on 19 October 1979. He said in examination-in-chief that he was riding his motorcycle No. PAB 7268 along Jalan Chain Ferry and was proceeding towards Butterworth when he was involved in an accident with a motorcar No. PV 298 which was travelling in the opposite direction and, as admitted by Tan Ong Kong @ Chan Man Kong (the respondent) in his statement of defence was driven by him. There was a centre white line on the road at the place where the accident occurred and according to the appellant he was knocked by the car on his side of the centre white line as the car crossed it in order to overtake a bus. The car came very fast and did not give any indication and he was not able to avoid it and the off side of his motorcycle came in contact with the off side of the car before the car could swerve back to its side of the road. The appellant then claimed that at the time of the accident the car was completely on his side of the road.

Under cross-examination the appellant stated that traffic was heavy at the time of the accident and just before that there was a bus and the car in question coming from the opposite direction. He did not see any trishaw on the road at the time and stated that he himself was travelling about midway between his edge of the road and the centre white line. He said that he noticed the bus some feet ahead and that there were other vehicles quite far ahead of it, and then went on to change his evidence and said that he did not know whether there were any vehicles behind the bus because of its size. The appellant later admitted that the accident occurred whilst the car in question was going back to its correct side of the road but he was not in a position to say whether the car had overtaken the bus at that time. He was also unable to say when he first noticed the car except that it was quite close and he could not do anything to avoid it. The appellant, on whom the burden of proof of course lies to prove his case, then admitted that he could not say exactly how much the respondent had encroached on to his side of the road but he reiterated that he was roughly in the centre of his side of the road. When challenged he said he did not think that he was as near as three feet from the centre white line and denied that the respondent was overtaking a trishaw. He knew that the off side of the car came into contact with him but could not say whether it was the front or rear part of the car. He denied the respondent's version that he was near the edge of the road when the respondent was overtaking a tricycle and that he came towards the latter's car.

The respondent on the other hand told the Court that he was driving his car PV 298 from Butterworth towards Prai when he was involved in the accident at Chain Ferry Road. Just before the accident there was a tricycle ahead of him and in front of it there was a car and a bus. The car was about ten feet in front of the tricycle which was ahead of him. He was waiting for the car to overtake the bus so that there would be space between the tricycle and the bus before he moved out. He had seen the motorcycle about 100 feet ahead and as there was only one vehicle coming from the opposite direction he moved out to overtake the tricycle which was near the side of the road. The tricycle was about three feet from the side of the road and when he was overtaking the tricycle the motorcycle suddenly came to his side whilst the motor-cyclist was looking towards some shops on his side of the road. He was travelling about 25 miles an hour when he applied his brakes.

Under cross-examination the respondent agreed that there were many vehicles ahead of him travelling slowly whilst there was no vehicle in front of the appellant's motorcycle. He saw the appellant's motorcycle 100 feet ahead driven close to his side of the road which was 40 feet wide. The tricycle, by which he meant a trishaw, was quite far out from the edge of the road which was sloping at the place of the accident. He then changed his evidence and said that the trishaw was about 16 feet from the side of the road. At that point he was referred to and cross-examined by Mr. Triptipal Singh, counsel for the appellant, on the evidence he had given in the Bukit Mertajam Magistrate's Court in 1980 and said that he would not know if the learned Magistrate had recorded his evidence correctly that he had 15 feet for his car to pass the trishaw which was 5 feet from the side of the road. He was therefore shown to be inconsistent in his evidence, which must therefore be scrutinised with care. The respondent also stated that the bus was on the right side of the road and that before he overtook the trishaw the car in front of him had not overtaken the bus. After the car had overtaken the bus there was no other vehicle between the bus and the trishaw which was about the space for two cars behind the bus. He intended to move to the rear of the bus and moved out at an angle to overtake the trishaw. However the respondent then freely admitted under further cross-examination that the appellant did not encroach into the wrong side of the road but added that the appellant was looking at some shop houses when he was cutting back to his side of the road. He saw the appellant's motorcycle coming towards him and at the time of the impact his car was still moving.

The police sergeant who investigated this case was called as a witness by the appellant. He produced a sketch plan which he had drawn and on which is a point marked D which shows the beginning of brake marks made by the car PV 298. The point D was 17 feet 1 inch from the motorcyclist's side of the road and the direction of the brake marks which ended at a point marked E together with the stationary position of the car PV 298 confirmed the appellant's admission under cross-examination that the accident occurred whilst the car in question was going back to its correct side of the road. The Police sergeant also described the damages found on both vehicles. He found that the motorcycle's front number was broken, a basket in front dented, the centre of the handle cracked and both the headlight and mirrors broken. He also found that the off side rear signal light of the car was broken, its off side rear mud-guard dented and its off side rear bumper bent outwards, which again to my mind, show that the appellant had collided with the off side rear part of the respondent's car as the latter was already going back to his correct side of the road.

I did not agree with the submission of learned counsel for the appellant that an adverse inference should be drawn against the defence for failing to subpoena the respondent's brother who had given evidence in the Magistrate's Court in 1980 but who was away attending a nephew's wedding; and having seen and heard the appellant, the respondent and the police sergeant give

their evidence as well as having studied the documentary evidence, especially the sketch plan produced in this case, I was satisfied and found that the respondent was mainly responsible for the collision in this case as he had crossed over to the wrong side of the road whilst overtaking other vehicle but it was also clear, and I so found, that the motor-cyclist was not entirely free from blame as he could have avoided the collision if he had continued to ride his motorcycle nearer to his side of the road instead of near the centre. He said earlier on that he saw the car in question behind the bus although he changed his evidence later and said that he did not know whether there was any car behind the bus because of its size. He had admitted under cross-examination that traffic was heavy at that time and ought to have foreseen that there could be harm to him if he failed to keep any proper lookout. He was guilty of contributory negligence as he did not foresee that, if he did not act as a reasonable prudent man, he might hurt himself; and in his reckonings he must take into account the possibility of others being careless. It would be apt here to refer to the following passage in the judgment of Lord Simon in the Privy Council case of *Nance v. British Columbia Electric Ry* [1951] AC 601, 611:

> the injured party did not in his own interest take reasonable care of himself and contributed by his own want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

On the evidence as a whole therefore, I found on the balance of probabilities that the accident occurred when the respondent was partly on the wrong side of the road but as he was cutting back to his correct side and whilst the appellant himself was driving about 3 feet from, or perhaps even nearer to, the centre white line. In the circumstances I apportioned liability as one-third on the part of the appellant and two-thirds on the part of the respondent.

As regards special damages I awarded, as agreed by both Counsel, a sum of RM400 for transport and food for the appellant's family to visit him in the General Hospital, Penang, and a sum of RM180 for taxi fares from Butterworth to General Hospital Penang for review at RM30 per round trip for six times. The appellant's claim for RM905 for loss of his watch, RM20 for loss of his crash helmet and RM40 for damage to his clothes and RM222.50 for repairs to his motorcycle were disallowed because the appellant could not prove the loss of these items specifically by producing receipts which could be admitted as evidence. As regards the appellant's claim for the loss of income at RM800 per month from 20 October 1979 to 31 December 1980 (14 months 11 days) Mr. P.R. Manecksha, counsel for the respondent, pointed out that only a profit and loss account (P6) for the year ended 31 December 1979 was produced by the appellant but there was no profit and loss account for the year ended 31 December 1980. In so far as the year ended 31 December 1979 was concerned, counsel for the respondent submitted that there was no loss of income for the year 1979 because the profit and loss account for the year ended 31 December 1979 (P6) shows that the appellant's income was not reduced. As regards the year ended 31 December 1980 counsel pointed out that the appellant had not produced any evidence to show a nil return of income for or from the Income Tax Department. Counsel therefore submitted that the plaintiff, on whom the onus of proving special damages lies and who should have in any event mitigated damages, had continued trading during the year ended 31 December 1980 and that although the appellant was not able to prove specifically what was the actual loss of his income for the period 20 October 1979 to 31 December 1980 he was generous enough to suggest that perhaps the appellant be compensated for half the loss of income claimed during that period. I therefore allowed a sum equivalent to half of RM11,493 claimed by the appellant as loss of income from 20 October 1979 to 31 December 1980. As regards the amount paid to the appellant's assistant called Nah Ah Kow I did not believe him that he was paid exactly RM300

a month by the appellant. He told the Court that the appellant paid him RM10 each day including the days when he did not work. He usually slaughtered one pig a day, but on festival days he slaughtered more than one pig. The appellant on the other hand had told the Court earlier on that he paid Nah RM10 for slaughtering each pig and on festival days three to four animals were slaughtered. Although counsel for the respondent submitted that the amount paid to Nah was about RM260 a month in view of the fact that according to the appellant's profit and loss account for the year ending 1979 a sum of about RM30 - RM40 p.m. was paid to a sundry work helper, yet I considered that in all the circumstances it would be fair to reduce the amount claimed i.e. RM300 per month by 10% and therefore awarded the appellant a sum of RM270 per month as the amount paid to his assistant for helping him run his business for the period 1 January 1981 to 24 November 1983.

On the loss of future earnings the appellant was 40 years old at the date of trial and should have another 15 years' working life. Counsel for the respondent suggested that 5 years should be deducted for contingencies and counsel for the appellant agreed that a multiplier of ten years be adopted. I therefore awarded general damages for loss of future earnings based on ten years' purchase at the rate of RM270 per month as I had earlier on assessed and found that RM270 per month be accepted as the amount paid by the appellant of Nah for assisting him to run his business.

As regards pain and suffering, counsel for the respondent referred to the medical reports on the appellant by both the medical officer of the General Hospital Penang and a specialist called Dr. Bell who had examined the appellant on 13 May 1980. The appellant was admitted into the General Hospital Penang after the accident on 19 October 1979 and was found to have the following injuries:

1. Laceration right forearm with cut extensor muscles.
2. Fracture mid shaft right radius.
3. Fracture lower third right ulna.
4. Subluxation lower radio-ulnar joint.

He was discharged on 5 December 1979 and readmitted on 20 December 1979 until 11 February 1980 for manipulation of displaced fractures. On examination it was found that the fractures of the right radius and ulna were weakly united in marked angulation deformity - 30° short of straight. Movements of right elbow were adequate. Rotation of the right forearm was nil - the limb being fixed in the neutral fore-aft position. Movements of the right fingers and thumb were stiff with inability to flex the fingers to the palm or to oppose the thumb to the base of the ring finger. Power in the wrist and fingers was weak and the hand grip for objects of small diameter very poor. Dr. Bell concluded that there was permanent disability due to seriously deformed right forearm resulting in a stiff and weak right hand with loss of manual dexterity and the ability to twist the forearm.

Counsel for the respondent contended that the grip of his right hand had improved slightly to Grade III and referred to *Besetti Appalanaidu v. State of Johore & Ors.* [1965] 2 MLJ viii in which case general damages of RM10,000 was awarded for permanent disability at right elbow joint and there was complete absence of pronation and supination at the forearm. He also referred to *Goh Beng Seng v. Dol bin Delah* [1970] 2 MLJ 95 in which case Sharma J (as he then was) had awarded general damages of RM17,380 for injuries which included fracture of the right radius and ulna, sustained at about the upper third. There was gross deformity of both bones at their fractures sites - more so of the ulna which has healed with an angular deformity convex outwards and subtending an angle of about 120° inwards. The patient was left with a badly bent right

forearm in its upper third. Counsel pointed out that the injuries in that case were more severe than those in the present case and submitted that given the space of time since that case RM20,000 for pain and suffering in this case would be sufficient as the plaintiff's hand was not useless and he could still cut meat. Mr. Triptipal Singh however without referring the Court to any authority on this point submitted that RM30,000 should be awarded for pain and suffering. In all the circumstances of this case, I agree with counsel for the respondent that as RM17,380 was awarded for pain and suffering in a rather similar case in 1970 in which the injuries were more severe, a sum of RM20,000 would be appropriate in the present case today for injuries which were less severe. I also awarded interest at the rate of 3% p.a. on special damages from the date of the accident to the date of trial and 6% on RM20,000 from service of writ to date of trial together with taxed costs. The damages assessed above were based on 100% liability on the part of the respondent for the accident but as I had found the appellant one-third liable for contributory negligence he would therefore be entitled to two-thirds of the various amounts assessed above and I made an order accordingly.

Also found at [1985] 1 CLJ 261